IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 89

KNUT EINAR HEIKKINEN, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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I. THE ALLEGED FAILURE TO APPLY FOR TRAVEL DOCUMENTS

The government assumes that the statute contains a clear and unequivocal command that an alien under an order of deportation make an independent application for travel documents directly to the country of his choice, and without regard to any advice or instruc-

tions he might receive from the Immigration Service. From this premise, the government draws two conclusions: (1) that petitioner's furnishing the Service with the requisite information for travel documents with the understanding that such information would be forwarded to the Finnish authorities was not any kind of application for travel documents (Govt. Br. 42, ftn. 17), and (2) that the sending by the Immigration Service to the petitioner of the text of the statute informed him that he was required to make an independent application for travel documents directly to Finland (Br. 29-33).

The government, however, reads into the statute more than is there. The statute requires an alien under order of deportation "to make timely application in good faith for travel or other documents necessary to his departure." It does not define "application" or say that the alien must apply directly to the country involved and independently of the Service. Hence, to apply the statute in any specific case, it is necessary to prove the requisite procedure for obtaining travel documents from the particular country and that this procedure was brought to the notice of the alien. Accordingly, to sustain a conviction here, the government would have had to show (1) that an application for travel documents must be made directly to Finland by the alien himself, and (2) that the petitioner was so informed. But no such evidence was produced here. On the contrary, such evidence as was produced showed (1) that the normal method for procuring travel documents was through Service channels, (2) that so far as any of the Service witnesses who testified were aware, there was no other method for the petitioner to obtain travel documents, and (3)

that the Service fostered this understanding by petitioner.

II. THE ALLEGED FAILURE TO DEPART

1. The government misconceives our argument as to the relation of the offenses of failure to depart and the failure to apply for travel documents. We do not, as stated by the government (Br. 34), contend that an alien cannot be guilty of both offenses. Our position is that the offenses are not identical, and that the failure-to-depart crime cannot be proved solely by evidence of a failure to apply for travel documents. This means, by a natural interpretation which avoids duplication of punishment, that the failure-to-depart crime can be committed only after the necessary travel documents have been obtained (by the Service or by the alien) or if travel documents are not necessary.

The government itself at one point seems to agree with our position. Initially, it distinguishes the failure-to-depart crime from the failure to apply for travel documents as follows (Br. 34): "The two offenses, separated in the statute by the disjunctive 'or' have different elements. An alien may depart informally without travel documents. On the other hand, an alien may obtain travel documents and not depart." Under this view, the conviction here for failure to depart must fall, since there was no evidence that travel documents had been obtained or that the petitioner could have left the country "informally" without travel documents. Subsequently, however, the government departs from its own analysis to argue (Br. 36-37) that a failure to depart can be proved solely by a failure to apply for travel documents. This has the vice

which the government itself repudiates of making the offenses identical.

Moreover, as indicated in our main brief (at p. 24), the trial court instructed the jury that the two offenses were identical and that they could find petitioner guilty of a failure to depart solely upon evidence of his failure to apply for travel documents.[1]

2. Nor is there any merit to the suggestion of the government (Br. 30, ftn. 11, and Br. 36), that the petitioner's conviction of a failure to depart can be supported by the evidence that he was a Canadian citizen, a circumstances showing, according to the government, that he could have departed to Canada within the six months period. As the government itself recognizes (Br. 30), however, the fact that he was a citizen of Canada does not mean that he could have entered Canada without first securing travel documents from that country. For an entry into Canada would have required that country to recognize the alien as a Canadian citizen and to indicate in some documentary form its willingness to receive him. Nor is there any warrant in the record for the government's intimation (Br. 32), that the petitioner could have obtained travel documents to Canada before the six months had expired. The government was not able to secure these docu-

[1] The government's intimation (Br. 38, ftn. 14) that the excerpt from the instructions set out in our main brief at p. 24 does not give a fair picture of the instructions on this question is not well taken. This was the only portion of the instructions in which the trial court defined the ingredients of the failure to depart offense. The references in the government's brief to other portions of the instructions are only to the court's reading of the indictment. Significantly, the government nowhere indicates any portion of the instructions in which the trial court distinguished between the elements necessary to prove the two offenses.

ments until "quite a long time after" the six month period had expired (R. 87).

Moreover, the Government's belated reliance in its brief upon Canada as a country for departure, a reliance expressly repudiated by the prosecutor at the trial (R. 87), is not justified under the statute. Section 20(a) of the Immigration Act of February 5, 1917, as amended by section 23 of the Internal Security Act of 1950, 64 Stat. 1010,[2] provided that an alien must be deported to the country of his choice if that country "is willing to accept him." Thus, until and unless the petitioner had been refused entrance to Finland, he was entitled to refuse to go to Canada.[3] There is nothing to show that Finland had refused to accept petitioner. On the contrary, we do know that petitioner obtained travel documents for Finland at a later date, although the record does not reveal by what method such documents were obtained.[4]

3. The legislative material referred to by the government at pp. 35-36 has no bearing on this case. All of the materials cited relate not to the statute enacted by Congress, but to earlier legislative proposals, none of which penalized a failure to apply for travel documents. The specific quotation from the Congressional Record at the top of p. 36 was made in the course of the congressional debate on H. R. 10, 81st Cong., 1st

[2] This section was carried forward in a revised form in the Immigration and Nationality Act of 1952. 8 U.S.C. sec. 1253.

[3] See our main brief at p. 37, for the trial court's erroneous consideration of the petitioner's preference for Finland rather than Canada as a factor in imposing sentence.

[4] Petitioner was prevented from departing for Finland by his indictment (See our main brief, p. 13).

Sess., a bill which did not provide for criminal offenses at all, but provided instead for the indefinite detention by the Attorney General of aliens who could not be deported because of the inability of the government to secure travel documents.[5] The debates and reports on these rejected proposals can throw no light on the narrow question involved here—which is whether Congress, in the statute which it did enact, intended to make a failure to apply for travel documents a double offense.

III. WILLFULNESS

A. The Instructions

The government concedes that the petitioner could not properly be convicted unless the jury was instructed that the alleged failure of the petitioner must be "willful and not innocent," and that, in the particular context, this meant that the jury had to find that petitioner "knew that he had to go forward, himself, with the procurement of travel documents" and did not "sincerely" believe "that he could properly wait for the government to produce such papers" (Br. 27-28). It contends, however, that the instructions which the trial court gave to the jury were adequate for that purpose. It quotes in extenso from the instructions at pp. 26-27, but nowhere refers to any specific language which could possibly convey this thought to the jury.

As support for its contention that the instructions were adequate, the government relies upon the trial court's repetition of the word "willfully" (Br. 26), and his instructing the jury that " 'Willful' as used in this

[5] This proposal was rejected because of Congressional doubts as to constitutionality. See Sen. Rep. 2239, 81st Cong. 2d Sess. p. 8.

statute, means an intentional failure and refusal to comply with the order of deportation" (Br. 27). On its face this instruction was inadequate to convey to the jury the issue even as formulated by the government above. Moreover, the definition of the word "willful" is not in accord with that approved by this Court.

The leading case on the meaning of "willful" in this Court is *Felton* v. *United States*, 96 U. S. 699. The doctrine of that case, which has been consistently followed by this Court, was set out as follows, at 702:

> "Doing or omitting to do a thing knowingly and willfully, implies, not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. 'The word "willfully"' says Chief Justice Shaw 'in the ordinary sense in which it is used in statutes means not merely "voluntarily" but with a bad purpose.' *Com.* v. *Kneeland*, 20 Pick 220. 'It is frequently understood' says Bishop 'as signifying an evil intent without justifiable excuse.' Cr. L. Vol. 1, sec. 428."

The same rule was formulated at a later date as follows in *United States* v. *Murdock*, 290 U. S. 389, at 397-8:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

At no time did the trial court tell the jury here that the failures must have been committed with bad faith or evil intent. On the contrary, the court expressly instructed the jury (R. 166) that "Wrongful acts know-

ingly or intentionally committed can be neither justified nor excused on the ground of innocent intent."

The government also suggests that the jury understood the issue in the case "from the course of the trial" (Br. 27). This suggestion is not documented in any way. And to the contrary is the fact, shown in our main brief (at 33-34), that the "course of the trial" was consistent with the view taken by the trial judge in his instructions—i.e., that petitioner was guilty if he failed to carry out his "duty to depart," even if his intent was innocent. Moreover, the "course" of a trial cannot cure erroneous or inadequate instructions. "The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria . . . we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them." *Bollenbach* v. *United States*, 326 U. S. 607, 613-614.

B. The Evidence

The government recapitulates (Br. 29-31) the items of evidence which it contends would have justified the jury in finding criminal intent, if the issue had been put to them. ~~There~~ The items do not, singly or in the aggregate, support a finding of guilt. Item 1 of the government's evidence consists of the letter of April 30, which, as we have shown (Br. 30), advised the petitioner that he should wait until he heard from the government. Nor could the text of the statute contained in that letter possibly convey to the petitioner notice that the Service wished him to take steps on his own. This letter therefore is evidence of innocence, not guilt. Item 2 is the irrelevant and unilluminating circumstance that petitioner lived near Duluth. Items 3 is the

testimony of government "witnesses"[6] that they had not said anything which would lead petitioner to assume that he could wait to hear from the government. But this testimony was a mere conclusory statement of Maki which was contrary to the actual facts of the interview (see our main brief, p. 29 and ftn. 8). Moreover, even if this conclusory testimony corresponded to the facts, it would merely negate a possible defense, not supply evidence of guilt. What is significant is that the government nowhere points to any testimony or documentary evidence that could possibly support the inference that petitioner knew or was advised that he was required to make an independent application to Finland. The fourth item—that petitioner was recognized as a Canadian citizen after the critical six-months period—we have already discussed. The fifth item is both a misstatement of the record and irrelevant. The government states that after the period covered by the indictment, petitioner was advised that "he could not merely await government action and must make periodic reports of his own efforts to obtain travel documents." The record (R. 122) does not support this statement. Petitioner was merely given a form in which he was asked to report on efforts he made to depart. But at no time was he told that he was required to make such efforts independent of the service or that he could not wait until he heard from the Service. Moreover, since the form was given to petitioner after the six-month period, he could not thereby have been notified

[6] Although the government refers to witnesses in the plural, its only reference is to the testimony of Maki (Br. 9), and in fact Maki was the only government official who spoke to petitioner during the six months period.

during the critical period of any obligation to make an independent application.

Respectfully submitted,

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